

HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROTOUCH, L.L.C. and 30/10 WEIGHT )  
LOSS, LLC, )  
Plaintiffs, ) Case No.: 2:17-cv-00996-MJP  
vs. )  
PAIGE DOYLE, AWAKEN 180 INC., )  
NEWTON WEIGHTLOSS, LLC, PEABODY )  
WEIGHTLOSS, LLC AND QUINCY )  
WEIGHTLOSS, LLC, )  
Defendants. )  
PAIGE DOYLE, AWAKEN 180 INC., )  
NEWTON WEIGHTLOSS, LLC, PEABODY )  
WEIGHTLOSS, LLC AND QUINCY )  
WEIGHTLOSS, LLC, )  
Counterclaimants/Third Party )  
Plaintiffs )  
vs. )  
MICROTOUCH, L.L.C. and 30/10 WEIGHT )  
LOSS, LLC, )  
Counterclaim Defendants )  
and )  
DR. ROCCO NELSON, an individual; and DR )  
LINDA DEGROOT (and their marital )  
community); and one or more JOHN DOES, )  
currently not known to Third Party Plaintiffs, )  
Third Party Defendants )

**AGREEMENT REGARDING DISCOVERY OF  
ELECTRONICALLY STORED INFORMATION AND ORDER  
(2:17-cv-00996-MJP) - 1**

1        The parties hereby stipulate to the following provisions regarding the discovery  
2 of electronically stored information (“ESI”) in this matter:

3        **A.        General Principles**

4        1.        An attorney’s zealous representation of a client is not compromised by conducting  
5 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate  
6 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and  
7 contributes to the risk of sanctions.

8        2.        The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be  
9 applied in each case when formulating a discovery plan. To further the application of the  
10 proportionality standard in discovery, requests for production of ESI and related responses should  
11 be reasonably targeted, clear, and as specific as possible.

12        **B.        ESI Disclosures**

13        Within 14 days after the Court issues a Case Scheduling Order, or at a later time if  
14 agreed to by the parties, each party shall disclose:

15        1.        Custodians. The ten custodians most likely to have discoverable ESI in their  
16 possession, custody, or control. The custodians shall be identified by name, title, connection to  
17 the instant litigation, the type of the information under his/her control; and the likely sources of  
18 their ESI (including, for example, hard drive, laptop, mobile devices, cloud storage, and other  
19 cloud sources on or in which such ESI may be stored).

20        2.        Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared  
21 drives, servers, etc.), if any, likely to contain discoverable ESI.

22        3.        Third-Party Data Sources. A list of third-party data sources, if any, likely  
23 to contain discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud”  
24 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to preserve  
25 information stored in the third-party data source.

1       4.     Inaccessible Data. A list of data sources, if any, likely to contain discoverable  
2 ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically  
3 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.  
4 P. 26(b)(2)(B).

5 | C. Preservation of ESI

6 The parties acknowledge that they have a common law obligation to take reasonable and  
7 proportional steps to preserve discoverable information in the party's possession, custody or  
8 control. With respect to preservation of ESI, the parties agree as follows:

9       1.     Absent a showing of good cause by the requesting party, the parties shall not  
10 be required to modify the procedures used by them in the ordinary course of business to back-  
11 up and archive data; provided, however, that the parties shall preserve all discoverable ESI in  
12 their possession, custody, or control.

13       2. All parties shall supplement their disclosures in accordance with Rule 26(e)  
14 with discoverable ESI responsive to a particular discovery request or mandatory disclosure  
15 where that data is created after a disclosure or response is made (unless excluded under (C)(3)  
16 or (D)(1)-(2) below).

17           3.       Absent a showing of good cause by the requesting party, the following  
18 categories of ESI need not be preserved:

- a. Deleted, slack, fragmented, or other data only accessible by forensics.
- b. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system.
- c. On-line access data such as temporary internet files, history, cache, cookies, and the like.
- d. Data in metadata fields that are frequently updated automatically, except last-opened dates, last-edited or last-modified dates, and the “last modified by” or “last edited” by metadata fields (see also Section (E)(5)).
- e. Back-up data that are substantially duplicative of data that are more accessible elsewhere.
- f. Server, system or network logs.

- g. Data remaining from systems no longer in use that is unintelligible on the systems in use.
- h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided that a copy of all such electronic data is routinely saved elsewhere (such as on a server, laptop, desktop computer, or “cloud” storage).
- i. Social media data, except that the parties shall not delete any existing social media accounts for Yelp, Facebook, Twitter, Instagram or Pinterest, and shall preserve those social media accounts’ “account history” or “account data” where available (see also Section E(3)(e)).

## D. Privilege

1. With respect to privileged or work-product information generated after the filing of the complaint, parties are not required to include any such information in privilege logs.

2. Activities undertaken in compliance with the duty to preserve information are protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

3. Information produced in discovery that is protected as privileged or work product shall be immediately returned to the producing party, and its production shall not constitute a waiver of such protection, if: (i) such information appears on its face to have been inadvertently produced or (ii) the producing party provides notice within 15 days of discovery by the producing party of the inadvertent production.

## **E. ESI Discovery Procedures**

1. On-site inspection of electronic media. Such an inspection shall not be permitted absent a demonstration by the requesting party of specific need and good cause or by agreement of the parties.

2. Search methodology. The parties shall timely attempt to reach agreement on appropriate search terms, or an appropriate computer- or technology-aided methodology, before any such effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of the search terms or computer- or technology-aided methodology.

In the absence of agreement on appropriate search terms, or an appropriate computer- or

1 technology-aided methodology, the following procedures shall apply:

2           a.     A producing party shall disclose the search terms or queries, if any, and  
3 methodology that it proposes to use to locate ESI likely to contain discoverable information. The  
4 parties shall meet and confer to attempt to reach an agreement on the producing party's search  
5 terms and/or other methodology.

6           b.     If search terms or queries are used to locate ESI likely to contain  
7 discoverable information, a requesting party is entitled to no more than 10 additional terms or  
8 queries to be used in connection with further electronic searches absent a showing of good cause  
9 or agreement of the parties. The 10 additional terms or queries, if any, must be provided by  
10 the requesting party within 14 days of receipt of the producing party's production.

11           c.     Focused terms and queries should be employed; broad terms or queries,  
12 such as product and company names, generally should be avoided. Absent a showing of good  
13 cause, each search term or query returning more than 250 megabytes of data are presumed to be  
14 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file  
15 types.

16           d.     The producing party shall search both non-custodial data sources and ESI  
17 maintained by the custodians identified above.

18           3.     Format. The parties agree that ESI will be produced to the requesting party in the  
19 following formats:

20           a.     All documents that exist in native formats, with the exception of emails  
21 (see Paragraph 3.b. below), including but not limited to Word documents, Excel spreadsheets,  
22 PowerPoint presentations, video files, audio files, and similar native formats, will be produced in  
23 their original, native, unaltered format. Each native document will be given a unique digital  
24 identifier, and the parties will refer to that identifier in discovery and court filings. To the extent  
25 that documents produced in native format cannot be rendered or viewed without the use of  
26 proprietary software, the parties shall meet and confer to minimize any expense or burden

1 associated with the review of such documents, including issues that may arise with respect to  
2 obtaining access to any such software or operating manuals. If production of a particular  
3 document as a native format file would result in the disclosure of information protected by the  
4 attorney-client privilege, the work-product doctrine, or that is otherwise protected from discovery,  
5 the producing party may object to its production as a native file and produce the document at issue  
6 with redactions in searchable PDF files with unique digital identifiers. Wherever possible, the  
7 remainder of the document should be produced in native format (for example, Excel spreadsheet  
8 portions that need not be redacted).

9                   b.        All e-mails should be produced in an archival or electronic data package  
10 format such as .pst, .ost, .mbox, or similar, in a manner that preserves the relationship between  
11 the e-mail and all of its attachments. Any attachments to an e-mail should be produced in the  
12 same electronic form in which they were transmitted.. Each email and attachment will be given  
13 a unique digital identifier in an accompanying .Bates Stamped PDF document and the parties  
14 will refer to that identifier in all proceedings. If production of a particular email in this format  
15 would result in the disclosure of information protected by the attorney-client privilege, the work-  
16 product doctrine or that is otherwise protected from discovery, the producing party may object to  
17 its production in this format and produce the email with redactions in searchable PDF files with  
18 unique digital identifiers. Wherever possible, the remainder of the document should be produced  
19 in native format (for example, email attachments or portions of email attachments (such as Excel  
20 spreadsheet portions) that need not be redacted).

21                   c.        Documents that exist in PDF format will be produced as searchable PDF  
22 files that are Bates numbered, in color when the original is in color.

23                   d.        Paper documents amenable to being imaged will be produced as searchable  
24 PDF files that are Bates numbered, in color when the original is in color. Reasonable efforts shall  
25 be made to scan the pages at or near their original size. Physically oversized originals, however,  
26 may be reduced provided that such reduction does not obscure any text or otherwise make the

1 document unreadable. In addition, reducing an image may be necessary to display production  
2 numbers and confidentiality designations without obscuring the text. The parties agree not to  
3 degrade the searchability of documents as part of the document production process. If a party  
4 desires additional information about a particular paper document produced in this form, the Parties  
5 will meet and confer regarding the appropriate means to supply that information.

6 e. To the extent reasonably possible and subject to the proportionality provisions of  
7 the Federal Rules of Civil Procedure, responsive information from Yelp, Facebook, Twitter,  
8 Instagram, and Pinterest social media accounts in the possession, custody or control of the parties  
9 shall be produced in the following manner: (1) text or picture posts shall be either printed and  
10 produced as PDF files or captured by screenshot and produced as JPG files (in color when the  
11 original is in color); and (2) audio or video posts shall be produced as audio or video files. The  
12 parties shall produce in a manner that identifies the date of the produced post and the social media  
13 account it came from. If the parties' social media accounts contained responsive posts in the past  
14 that have since been deleted, overwritten or modified, then the parties shall meet and confer to  
15 discuss the potential production of that historical information (for example, from a social media  
16 account's "account history" or "account data" where available and to the extent possible).

17 4. De-duplication. The parties may de-duplicate their ESI production across  
18 custodial and non-custodial data sources after disclosure to the requesting party. If a document is  
19 de-duplicated, then the metadata field called "OTHERCUSTODIANS" must be provided listing  
20 the identities of other custodians who were in possession of the document at the time of collection,  
21 but whose copy has been withheld as a duplicate.

22 5. Metadata fields. If the requesting party seeks metadata, the parties agree that only  
23 the following metadata fields need be produced: document type; custodian and duplicate  
24 custodians (or, if none, a generalized location); author/from/sender; recipient/to, cc and bcc;  
25 title/subject; file name and size; original file path; date and time created, sent, modified and/or  
26 received; and hash value.

1       ***For Plaintiffs/Counterclaim-Defendants***

2       MICROTOUCH, L.L.C. and 30/10  
2       WEIGHT LOSS, LLC

3       By: /s/ Kim D. Stephens

4       By: /s/ Janissa A. Strabuk

5       By: /s/ Noelle L. Chung

6       TOUSLEY BRAIN STEPHENS PLLC

7       Kim D. Stephens, WSBA #11984

8       Janissa A. Strabuk, WSBA #21827

9       Noelle L. Chung, WSBA #51377

10      kstephens@tousley.com

11      jstrabuk@tousley.com

12      nchung@tousley.com

13      1700 Seventh Avenue, Suite 2200

14      Seattle, Washington 98101

15      Telephone: (206) 682-5600/Fax: (206) 682-2992

16      And

17      By: /s/ Bradley P. Thoreson

18      FOSTER PEPPER PLLC

19      Bradley P. Thoreson, WSBA No. 18190

20      brad.thoreson@foster.com

21      1111 Third Avenue, Suite 3000

22      Seattle, Washington 98101-3299

23      Telephone: (206) 447-3867/Facsimile: (206) 749-1923

24       ***For Third-Party Defendant***

25      DR. LINDA DEGROOT

26      By: /s/ Kim D. Stephens

27      By: /s/ Janissa A. Strabuk

28      By: /s/ Noelle L. Chung

29      TOUSLEY BRAIN STEPHENS PLLC

30      Kim D. Stephens, WSBA #11984

31      Janissa A. Strabuk, WSBA #21827

32      Noelle L. Chung, WSBA #51377

33      kstephens@tousley.com

34      jstrabuk@tousley.com

35      nchung@tousley.com

36      1700 Seventh Avenue, Suite 2200

37      Seattle, Washington 98101

38      Telephone: (206) 682-5600/Fax: (206) 682-2992

1 ***For Third-Party Defendant***

2 DR. ROCCO NELSON

3 By: /s/ Bradley P. Thoreson

4 FOSTER PEPPER PLLC

5 Bradley P. Thoreson, WSBA No. 18190

6 brad.thoreson@foster.com

7 1111 Third Avenue, Suite 3000

8 Seattle, Washington 98101-3299

9 Telephone: (206) 447-3867

10 Facsimile: (206) 749-1923

11 ***For Defendants/Counterclaimants/Third-Party Plaintiffs***

12 PAIGE DOYLE, AWAKEN 180 INC.,

13 NEWTON WEIGHTLOSS, LLC

14 PEABODY WEIGHTLOSS, LLC

15 QUINCY WEIGHTLOSS, LLC

16 By: /s/ Howard E. Bundy

17 BUNDY LAW FIRM PLLC

18 Howard E. Bundy, WSBA #11762

19 bundy@bundylawfirm.com

20 5400 Carillon Point

21 Kirkland, Washington 98033

22 Telephone: (425) 822-7888

23 Fax: (206) 801-3480

24 WITMER, KARP, WARNER & RYAN LLP

25 Eric H. Karp, BBO #260280

26 Ari N. Stern, BBO #672442

27 *Admitted Pro Hac Vice*

28 ekarp@wkwrllaw.com

29 astern@wkwrllaw.com

30 22 Batterymarch Street

31 Boston, Massachusetts 02109

32 Telephone: (617) 423-7250

33 Fax: (617) 423-7251

## ORDER

2 | Based on the foregoing, IT IS SO ORDERED.

3 DATED this 19th day of December, 2017.

  
Marsha J. Pechman  
United States District Judge

Marsha J. Pechman  
United States District Judge

**AGREEMENT REGARDING DISCOVERY OF  
ELECTRONICALLY STORED INFORMATION AND ORDER  
(2:17-cv-00996-MJP) - 10**